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Five Steps to Maximizing a Nonprofit's Insurance Coverage

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Matching the potential risks faced by a nonprofit organization with its insurance policies can challenge even seasoned executives. Policies often employ arcane, confusing language. The diversity of nonprofit organizations defies a one-size-fits-all mentality. Significant shifts in priorities, as well as new programs and activities, may require shifts in insurance coverage. And let's be honest—few people start or go to work for a nonprofit because they yearn to monitor insurance issues.

Based on our experience counseling nonprofit organizations, we have identified the following five fundamental steps that can maximize the effectiveness of insurance policies without diverting too many resources. If missed, however, these steps can result in uncertainty and uninsured risk.

Step 1: Understand the Options That a Nonprofit Has.

Although every insurance policy is different, there are some principal types of policies from which a nonprofit can choose:

- **Automobile** – Even a nonprofit that does not own its own automobiles can sometimes purchase an automobile liability policy that provides better coverage at better rates for rental cars than the coverage purchased at a car rental desk.
- **Commercial General Liability** – Known colloquially as the "CGL," this policy remains something of a blanket policy for unexpected accidents that injure attendees, customers, visitors, and others generally unaffiliated with the nonprofit.
- **Directors & Officers** – Often described as the "D&O," this policy typically protects directors, officers, and employees facing personal liability for alleged wrongdoing that occurs within the scope of their work and results in financial losses (including employment-related liabilities), as well as protects the nonprofit itself for such claims.
- **Errors & Omissions** – This policy focuses more on negligence that occurs as part of a nonprofit's activities. As errors & omissions coverage may intersect with D&O coverage, a nonprofit must take care to understand the potential risks that may be left uninsured if it forgoes an "E&O" policy.
- **Employee Dishonesty/Fidelity** – This policy can cover the losses that may result from an employee misusing a nonprofit's property or assets for personal use.
- **ERISA/Fiduciary** – This policy generally protects a nonprofit from certain liabilities related to retirement, profit-sharing, and health insurance plans.
- **Property Damage** – This policy can cover physical damage to a nonprofit's office space and employee property.
- **Special Events** – This hybrid policy generally provides coverage focused on risks associated with conventions, meetings, and the like.
- **Umbrella** – This policy is triggered once catastrophic events exhaust the limits of underlying policies, such as a CGL.
- **Workers' Compensation** – This policy may protect a nonprofit from litigation involving workplace injuries to its employees.

Selecting which policies to purchase requires a careful examination of a nonprofit's programs and activities, its environment, governing law, the size of a nonprofit's potential liabilities, and the ability and willingness of a nonprofit to weather those liabilities without insurance coverage.

By no means is this a complete list, as insurance companies offer specialty policies and endorsements to cover unique risks. While they may result from outside-the-box thinking, the terms in specialty policies may not be as well known as those in traditional policies. Pointed inquiries about claims made under those policies, the risks that they do (and do not) cover, and additional resources for guidance are necessary to make sure that these policies warrant the investment.

Step 2: Understand the Options that a Nonprofit Has Chosen.

A nonprofit can encounter problems if it tries to use traditional policies to cover unique risks or risks typically covered by other policies. Some insurers offer “association professional liability” or “nonprofit organization” policies, which sometimes combine certain aspects of D&O coverage, E&O coverage, and coverage against certain employment-related liabilities. Such policies do not insure all of a nonprofit’s expected risks. For instance, they generally do not protect a nonprofit sued by unhappy customers for personal injury damages. Nor do they generally cover personal injuries from automobile accidents, damage to the lobby caused by a flood, or breach of contract claims.

Policy decisions also should follow from critical thinking about the role that insurers will play. Some policies permit organizations to select their own defense attorneys; others give that choice, in whole or in part, to the insurer. Some insurance policies will reimburse certain expenses, such as certain lost employee time and expenses incurred by responding to subpoenas or investigative requests, whereas other policies will not. If organizations start thinking about these issues after a subpoena or claim has been served, it is often too late to do anything about them.

Those decisions also should acknowledge the fact that some risks cannot be insured. Even to the extent not excluded by insurance policies, state law can limit the circumstances in which anyone or any organization can receive insurance benefits for certain activities, such as intentional misconduct, certain illegal conduct, or actions resulting in punitive damage awards.

Step 3: Make Clear Who Will Benefit from the Policies.

Not identifying the right “insured persons”—those who should benefit from any coverage purchased—can lead to unwanted surprises. Insurance policies often misidentify the nonprofit that purchased them, include the wrong address for the nonprofit, or fail to extend coverage to all of the organizations that should receive insurance benefits, such as subsidiary or affiliated organizations. These are easily correctable issues that, if left uncorrected, can have potentially serious repercussions.

Nonprofits sometimes overlook the importance of ensuring that their policies extend coverage to all of the people who perform their work. This issue frequently arises with regard to volunteers, who are not always among the classes of people to whom coverage is extended. Even in states that protect volunteers for certain nonprofits against personal lawsuits, extending coverage to volunteers may benefit the organization; proving that a volunteer is immune from suit may require an attorney retained and paid by an insurer. Moreover, state volunteer protection statutes generally do not extend to all types of nonprofits.

Step 4: Protect What the Nonprofit Has Purchased.

Simply purchasing policies does not guarantee coverage, even during the policy period. Some nonprofits do not even keep copies of their policies—a practice that can impede determinations of whether they should submit a claim and the insurers to which a claim should be submitted.

A nonprofit also can encounter problems if it does not report new locations or activities that impact the risks insured by their policies. If an insurer prices its D&O coverage based on an understanding that a nonprofit engages in certain activities, but would have issued a materially different policy had it known that the nonprofit engages in other activities, it may be able to avoid its coverage obligations. Such unintentional misrepresentations can occur when, during a policy period, a nonprofit enters a new line of activity without advising its insurance companies. Adding a nonprofit’s insurers and broker to the list of those that must be advised of such developments or making that notice part of any due diligence process may protect the insurance coverage purchased.

Similar problems can occur if an insurer does not receive prompt notice of a potential claim. Policies often require that insurers receive notice about a claim promptly or within a certain number of days. If a claim falls through the cracks, some states will not excuse an insurer’s obligations unless it can prove prejudice resulting from the delayed claim. Avoiding that argument altogether by submitting a timely claim is the preferred course.

Step 5: Insist on Ongoing, Effective Communication.

To some extent, a nonprofit can (and should) rely on its insurance broker to identify the right policies to purchase and advise insurers about material developments. Identifying the appropriate times, manners, and messages to send is one of many reasons why a nonprofit should maintain an active relationship with a qualified insurance broker, particularly one who understands the unique challenges of securing adequate insurance for a nonprofit. The critical importance of this relationship cannot be overstated.

A nonprofit's emphasis nonetheless should be on delegation, not abdication. Even if a broker will report a claim or other significant development to an insurer, the nonprofit should insist that the communication be in writing, receive a copy, and follow up to make sure that the message was delivered. Calendaring the end of all policy periods, including six-week to one-month reminders, so that new terms and conditions can be negotiated, is another way to make sure that the nonprofit and broker are on the same page.

This participation cannot be passive. A nonprofit that fails to understand and ask its insurers, broker, and/or insurance coverage counsel about materials related to its policies is ill positioned to complain about a missed development. A nonprofit should remain diligent even when "renewing" insurance policies, which sometimes include new exclusions and new limitations. These developments also may escape notice because many insureds and brokers may find them inconsequential; inserting a new endorsement that precludes coverage for lobbying activities may not affect most insureds, but it would radically affect the desirability of a policy if a nonprofit has an active federal or state lobbying program.

Conclusion

When faced with a multi-million-dollar claim, the aftermath of a natural disaster, or other potential catastrophe, adding a dispute with its insurance company is hardly the way to protect a nonprofit. Although no silver bullets exist, these steps are intended to help protect nonprofits and their leadership from the misunderstandings that can result in such disputes. Taking these small steps should help put the nonprofit in a favorable position; not taking them may just add to the worries that it hoped to avoid by purchasing insurance in the first place.

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